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Issue Date: 24 March 2004

CASE NO.: 2003-LHC-00307
OWCP NO.: 4-35385

In the Matter of:

RONALD WOZNIAK,
Claimant,

v.

UNIVERSAL MARITIME SERVICE,
Self-Insured Employer.

Appearances: Myles R. Eisenstein, Esq.,
Bruce B. Eisenstein
For Claimant

Lawrence P. Postol, Esq.
For Employer

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND DENYING MODIFICATION

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Employer is seeking modification of the 2002 Decision and Order Granting Benefits issued by Administrative Law Judge Linda Chapman in Case No. 2001-LHC-3365 based on its claim that Judge Chapman erroneously determined Claimant sustained an injury within the meaning of the Act on April 6, 2001 (Emp. Br. at 23-29).[1] Claimant is seeking an award of temporary total disability compensation from April 16, 2002 through February 24, 2003 and also seeks modification of Judge Chapman's decision with respect to her calculation of Claimant's average weekly wage.

[1] The following abbreviations will be used as citations to the record: "Emp. Br." for Employer's Post-hearing Brief, "Cl. Br." for Claimant's Post-hearing Brief, "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

Procedural History

Claimant's original claim for benefits was heard by Judge Chapman on January 17, 2002. On May 7, 2002, she issued an order granting temporary total disability benefits for the period April 25, 2001 through June 24, 2001. *Wozniak v. Univ. Maritime and Schaffer Co*., 2001-LHC-3365. In particular, Judge Chapman found that Claimant established a *prima facie* claim for compensation, which gave rise to the Section 20(a) presumption that Claimant's injury arose out of his maritime employment. *Id.* at 11-12. She further found that Employer failed to rebut this presumption, and Claimant had therefore suffered an injury within the meaning of the Act. *Id*. at 12-13.

A formal hearing was held before me on April 9, 2003 in Baltimore, Maryland at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulation. Claimant offered exhibits 1 through 22 which were admitted into evidence. Employer offered exhibits 1 through 31 which were also admitted into evidence. ALJX 1 through 3 were marked for identification and admitted into evidence without objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory and regulatory provisions, and pertinent precedent.

STIPULATIONS

The parties have stipulated (Tr. 6-8) and I find:

1. That the parties are subject to the Act.
2. That Claimant and Employer were in an employee-employer relationship at all relevant times.
4. That timely notice of injury was given by Claimant to Employer.
5. That Claimant filed a timely claim for compensation.
6. That Employer filed a timely first report of injury and notice of controversion.
7. That Employer paid to Claimant temporary total disability benefits for the period April 25, 2001 through June, 24, 2001.

ISSUES

1. Whether Judge Chapman's determination that Claimant sustained a compensable injury arising out of and in the course of his employment with Employer on April 6, 2001 resulted from a mistake in a determination of fact?
2. Whether Claimant was temporarily and totally disabled from April 16, 2002 through February 24, 2003 due to a work-related injury?
3. Whether Employer is responsible for the medical bills of Dr. D. Graham Slaughter?
4. Whether Judge Chapman's finding that Claimant's average weekly wage as of April 6, 2001 was $1,134.81 resulted from a mistake in a determination of fact?

FINDINGS OF FACT[2]

Ronald Frank Wozniak

Claimant is 44 years old and divorced. He completed the ninth grade and has been a longshoreman for 25 years (Tr. 25). In April 2001, he worked as a gang carrier (three days a week) and a foreman (one day a week). He also occasionally filled in for absent workers while substitute workers were being dispatched, which usually took about one hour (Tr. 27). He sometimes worked as a crane operator, tractor driver, lasher, and performed other general longshoreman jobs (Tr. 27).

On Friday, April 6, 2001, Claimant worked as a foreman, handing out slips to truck drivers directing them to various locations to pick up and drop off containers (Tr. 28). He did this work for four hours that morning. *Ibid.* Claimant testified that one truck driver kept his window "closed" prompting Claimant to "keep reaching up and reach into his window to give him a slip." *Ibid.* Claimant testified that as he was doing so he "just started feeling . . . sharp pains going down [his] backside," which continued throughout the day. *Ibid.* He said he felt pain in the left side of his back going down to the back of his foot. *Ibid.* After completing work that day, Claimant rested all weekend, but the pain got worse. *Ibid.* He testified that he called Dr. Ira Fedder, an orthopedic surgeon, on Monday, but was unable to get an appointment until Wednesday, April 11, 2001. *Ibid.*; Tr. 34.

Claimant testified that he sustained a prior back injury in 1996 for which he underwent therapy, and was subsequently released to work without restrictions on June 21, 1996 by Dr. Farazinski. *Ibid.* At the time of his 1996 injury, he felt pain in the right side of his back, and this pain was not of the same type as he felt on April 6, 2001 (Tr. 30). When he returned to work in 1996, he worked without difficulty as a full-time crane operator, which involved constant bending with no lumbar support, as well as climbing a ladder that was over 50-60 feet high (Tr. 29-30). Claimant added that his 1996 injury was his only previous back injury (Tr. 64).

On April 6, 2001, Claimant reported to Employer's superintendent, Leo Finn, that he experienced back pain, but did not describe how he injured his back (Tr. 31). Claimant testified that he later gave a recorded telephone statement to Beth Straw-Thomas, but did not describe in this statement how he got hurt (Tr. 32).

Claimant denied that he initially thought his back pain on April 6, 2001 was a result of his 1996 injury "acting up" (Tr. 55). He acknowledged he gave a copy of his MRI report from 1996 to Chuck Colgan, who handled safety issues for Employer, but stated that he did so only because Colgan asked him for it. *Ibid.* Initially, Claimant indicated that he was not sure why Colgan made this request (Tr. 56). However, he later recalled that it was Beth Thomas-Straw, the Regional Claims Manager for Carrier, who requested the report in order to start his

[2] This decision takes into account the exhibits and testimony offered by the parties when the claim was originally decided by Judge Chapman, including the testimony of Claimant and Beth Straw-Thomas and exhibits produced by both Claimant and Employer relating to Dr. Fedder, Dr. Miela, Dr. D. Graham Slaughter, Dr. Charles J. Lancelotta, Dr. Cyrus Pezeshki, and Dr. Edward R. Cohen, all of which are described in Judge Chapman's order and incorporated herein by reference. *Wozniak*, 2001-LHC-3365 at 2-9.

compensation. *Ibid.* Claimant added that it was Straw-Thomas who first brought up the 1996 injury (Tr. 57). He denied telling her that his back problem in April 2001 was due to his 1996 injury or stating to her that he would simply allege a new injury after she informed him that the statute of limitations on his 1996 injury had run out (Tr. 57).

Claimant testified that he continued to work up to and including April 24, 2001, but arranged to work only as a gang carrier in order to take it easy on his back (Tr. 33). He testified, however, the pain kept getting worse and reached a point where he could hardly pick up his leg. *Ibid.* Dr. Fedder ordered an MRI and, upon reviewing the results, informed Claimant that he had herniated discs (Tr. 34). Claimant testified that Dr. Fedder advised him there were two possible treatments, surgery or a nerve block. *Ibid.* Claimant chose the latter treatment, which took approximately nine weeks and relieved his back pain for approximately seven months, until April 16, 2002 (Tr. 35).

On June 20, 2001, Claimant saw Dr. Slaughter, who recommended surgery (Tr. 35-36; CX 13). Claimant testified that he refused to undergo surgery at that time and returned to work on June 24, 2001 (Tr. 35, 37). While at work, he experienced pains running down his leg that were less severe than before, but became increasingly worse. *Ibid.* He also experienced sharp pains every time he picked up heavy objects. *Ibid.* Claimant testified that he continued to work as a foreman when he returned to work and also drove a fifth wheel truck which was very bouncy and hurt his back (Tr. 59).

On April 16, 2002, according to Claimant, he "all of a sudden [] started getting real sharp pains running down the leg" while at work (Tr. 37-38). The pain became unbearable, and he could not move his left leg. *Ibid.* Claimant testified that he did not have any back injuries between June 24, 2001 and April 16, 2002 (Tr. 38, 51). He subsequently saw Dr. Slaughter again and agreed to a surgery which was performed April 30, 2002 at the Union Memorial Hospital (Tr. 39). Claimant testified that the surgery "took some of the sharp pains away, but it did not take all the pain away." *Ibid.* He also stated he was unable to report back to work after the surgery because his leg was weak and "all the pain was there" (Tr. 39).

Claimant testified that he saw Dr. Pollak in July 2002, and that he opined Claimant could return to work if he wore a leg brace. *Ibid.* Claimant testified that he could not do so because his left leg was weak, he was "still dragging the leg more or less," and Dr. Slaughter had told him he would become dependent on a brace if he wore one (Tr. 40). He added that no one provided him with a brace during that period of time. *Ibid.* According to Claimant, he could not lift his foot off the ground at the time of this hearing, and lifting his foot caused him to experience sharp pain across the bottom of the foot. *Ibid.* He testified that he walks with a limp, and has to lift his left leg up "extra high" to avoid tripping because his foot drops down when he walks (Tr. 41).

On January 9, 2003, according to Claimant, Dr. Slaughter performed a second surgery, and he authorized Claimant to go back to work around February 24, 2003 (Tr. 41-42). Claimant testified that he asked for this authorization because he was "feeling pretty good. The second surgery made me feel a lot better than the first one, and the pain wasn't near as sharp as it was the previous time." *Ibid.* Claimant explained that he imposed certain restrictions on himself

after he went back to work to avoid irritating his back. In particular, he no longer drove fifth wheel trucks or operated cranes because they involve a lot of "moving, jarring and shaking," even though he believes he could do so (Tr. 42-44). Instead, he worked on only one crane, a Favco crane, which did not require driving around (Tr. 43). In addition, he tried to be careful when lifting anything. *Ibid.* Claimant testified that he has been working continuously since he last returned to work in February 2003 (Tr. 45). However, he does not feel good about working because he is working in pain and the shooting pain in his foot seems to be coming back more often (Tr. 51).

Claimant further testified that he is currently taking Demerol prescribed by Dr. Slaughter on an "as needed" basis when his pain gets worse, *e.g.*, on "rainy days" (Tr. 51, 63). Claimant stated he had not seen Dr. Slaughter since February 24, 2003 (Tr. 62). He also testified that Dr. Slaughter's Demerol prescription was not refillable, it was for 50 pills, and he recently took the last pill (Tr. 63).

Claimant denied on cross-examination that he reported 35 hours of work on March 2, 2003 (Tr. 46). He testified, however, that he could legitimately record more than 24 working hours a day in either of two ways (Tr. 60). First, if he "doubled up" for an absent worker, he was paid for doing two jobs (Tr. 45-47; ER 31). He acknowledged that he was not required to do it, but did so to maintain the productivity of his gang in order to get more orders (Tr. 54).[3] Since he last returned to work, he had done this once (Tr. 46-47). Second, the hours he recorded could exceed 24 in one day because, as a foreman/gang carrier, he was guaranteed to get paid for nine hours every day, so if he worked all night and then continued to work past 8 a.m., he would get paid for another eight hours (Tr. 48, 50, 61). Claimant testified that the record of his work hours does not explain how he earned his work hours, and he stated that his actual work hours are reflected in the company logs (Tr. 60, 62). He could not explain why records for March 2, 2003 reflected 35 hours of work. He noted, however, that the total amount of money recorded for that day ($227) does not correctly reflect his pay for this number of hours at the rate of $27 per hour (Tr. 49-50).

Beth Straw-Thomas

Beth Straw-Thomas testified that she is a Regional Claims Manager for Schaffer Companies (Tr. 66). She testified that in April 2001, "[t]here was a lost time slip produced [by Claimant] and he said it was from his 1996 back injury, and I indicated to him that we needed to find the claim file because it had been five years" (Tr. 66). She further testified that in May, 2001, after she located the 1996 file, she informed Claimant that he was barred by the statute of limitations from receiving any compensation payments, but further informed him that Employer was still obligated to pay for his medical treatment (Tr. 66-67). According to Straw-Thomas, Claimant responded that he was going to file a new claim, but did not specify what it would be for (Tr. 67). She added that Claimant was angry and abruptly hung up the phone. *Ibid.*

[3] Claimant explained that he does not get paid for two jobs if he fills in for a short period of time until a substitute worker arrives. *Ibid*. He further testified that as a gang carrier, he could have left after checking all the gang members in, but instead he often stayed and oversaw their work (Tr. 53).

Straw-Thomas denied ever asking Claimant for records with regard to the 1996 accident (Tr. 68). Instead she requested the 1996 claim file from the Department of Labor, because Employer routinely destroyed all files after five years (Tr. 68-69). She testified that Colgan had been looking for a copy of this file in his office, but could not find one. *Ibid.* She indicated that Colgan could have asked Claimant to produce medical records concerning the 1996 incident, but was not sure whether he did so (Tr. 69).

Andrew, Pollak, M.D.

Dr. Pollak testified that he is an orthopedic surgeon (Tr. 70; EX 24). He attended college and medical school at Northwestern University, completed a residency in orthopedic surgery at Case Western Reserve University, University Hospitals of Cleveland, and subsequently completed a fellowship in orthopedic trauma surgery at the University of California Davis Medical Center. *Ibid.* Since that time, he has been on the faculty at the University of Maryland School of Medicine, is currently a full-time Associate Professor of Orthopedics, and previously served as Acting Chairman in the Department of Orthopedic Surgery (Tr. 70-71; EX 24). Dr. Pollak is board-certified in orthopedic surgery, has hospital privileges at the University of Maryland Medical System, including the R. Adams Cowley Shock Trauma Center, the Baltimore Veteran's Administration Medical Center, and James Lawrence Kernans Hospital. *Ibid.* He is also an associate team physician for the Baltimore Ravens of the National Football League and provides consultations regarding emergency care, spine injuries, and fracture care (Tr. 71-72; EX 24). Dr. Pollak has received research grants from the Orthopedic Trauma Association to study lung injuries following femur fractures and from the International Foundation to study outcomes of high energy pylon or ankle-type fractures. He was also part of a National Institutes of Health grant to study outcomes of high energy lower extremity injuries (Tr. 73; EX 24). He has published approximately thirteen scientific papers in peer review journals, has performed peer reviews for the Journal of Bone and Joint Surgery, and has authored several chapters in medical books (Tr. 73-74; EX 24).

Dr. Pollak performed an independent medical evaluation of Claimant on July 26, 2002 (EX 23). The report of his evaluation reflects that he was asked by Beth Straw-Thomas and Employer's attorney to address four specific questions: (1) whether Dr. Slaughter's surgery on April 30, 2002 was reasonable and necessary and related to the alleged April 6, 2001 injury; (2) whether Claimant had a neurological deficit in his foot which was causally related to the April 6, 2001 incident or to the April 30, 2002 surgery; (3) whether Claimant had any current work restrictions, and, if so, whether he could perform the jobs of gang carrier/foreman; and (4) whether Claimant had reached maximum medical improvement ("MMI") with respect to the April 6, 2001 incident. *Ibid*.

Based on his examination, and a review of the extant medical evidence, Dr. Pollak concluded that the activities in which Claimant was engaged on April 6, 2001 were not likely to cause herniation of an intervertebral disc or to cause a previously asymptomatic disc herniation to become symptomatic (EX 23 at 6). Indeed, he noted that "traction and stretching, activities similar to those the claimant alleges led to the problem are often employed as treatments for individuals with disc herniations because these modalities are associated with relief of symptoms from disc herniation." *Ibid*. It was his opinion that Claimant's history was "completely

consistent with insidious onset of pain following atraumatic herniation of an intervertebral disc." *Ibid*. In light of the fact that Claimant had reported no work-related accident that, in Dr. Pollak's opinion, could have possibly caused his disc herniation, he believed there were two possible explanations: the disc herniation occurred when Claimant was not at work and only became symptomatic while he was working; or the disc herniation occurred at work. He stated that it was his opinion "beyond a reasonable degree of medical certainty that no work related activity thus far described specifically caused the condition to become symptomatic." *Ibid*. He further believed that it was more likely than not that the condition developed during Claimant's non-working hours simply because Claimant spent more time in non-work related activities than he did in work-related activities. *Ibid*. With respect to Claimant's activities on April 6, 2001, Dr. Pollak explained:

> There is . . . no evidence that anything the claimant was doing in the course of his employment aggravated the herniated disc. Simply reaching to pass a slip into the open window of a vehicle should not cause an otherwise asymptomatic herniated disc to become symptomatic. Herniated discs cause pressure on nerve roots. That pressure results in pain in the back radiating to the leg in the distribution of the nerve root being compressed. This is exactly what happened in Mr. Wozniak's situation and I believe, beyond a reasonable degree of medical certainty, that nothing the claimant did or did not do at work influenced the natural history of this pathologic process in his body one way or another.

(EX 23 at 7).

Dr. Pollak's report notes, with respect to Claimant's left foot-drop, that Claimant was at risk for falling when ambulating without an ankle-foot orthosis. *Ibid*. He believed that it was unsafe for Claimant to return to any occupation which required working at unprotected heights or where tripping could result in falling from a significant height unless Claimant was wearing an ankle-foot orthosis. After reviewing videotapes depicting the jobs of foreman, gang carrier, crane operator, and yard hustler driver, it was Dr. Pollak's opinion that Claimant could not safely perform those jobs with an un-braced foot drop.[4] He believed, however, that if Claimant wore and became proficient in ambulating with an ankle-foot orthosis, he could return to work in the jobs of gang carrier, foreman, crane operator, or yard hustler driver. *Ibid*.

According to Dr. Pollak, it typically takes 18 months to achieve MMI after surgical treatment of a herniated disc with associated nerve root compression and neurologic deficit. *Ibid*. He believed that, at the time he examined him in July 2002, Claimant had not reached MMI following Dr. Slaughter's April 30, 2002 surgery. He also believed that the surgery was reasonable and necessary, that Claimant's neurologic deficit was causally related to his herniated

[4] Employer has also offered into evidence "job analysis reports" that describe the job duties, work hours and availability of the following positions: crane operator, yard hustler/5th wheel driver, foreman/longshoreman, and gang carrier/leader (CX 25). According to these reports, the percentage of time spent sitting is 98% for the crane operator and driver, zero for foreman (75% standing and 25% walking), and 60% for gang carrier (35% walking and 5% standing). *Ibid.*

disc, and that it had "likely been present since the episode of acute exacerbation of his symptoms on or about [April 6, 2001]."[5] *Ibid*.

Dr. Pollak testified during the formal hearing his evaluation report was based on his examination and interview with Claimant, a review of his medical records, and the testimony and deposition that Claimant presented at and prior to the previous hearing (Tr. 76). He added that he had witnessed the testimony of Claimant at the hearing that morning which is summarized above. *Ibid.*

In formulating his opinions in this case, Dr. Pollak accepted as true Claimant's description of his work activities on April 6, 2001 (Tr. 76-77). In light of all the evidence, it remained Dr. Pollak's opinion that the activities in which Claimant engaged that day were not likely to have caused a herniated disc (Tr. 77). With respect to the basis for that opinion, Dr. Pollak testified:

> First of all, there is no specific incident that he describes on that date of a popping, of a sudden onset of pain, of a sharp sudden changing condition. Even more importantly, there is no instance during that date of any accident when he slipped and fell and when he bent over. Reaching up, just reaching up to put something in a window shouldn't cause a herniated disc. The mechanics aren't correct for that. If he had slipped on the water and bent over and fallen in that situation that might have done it, but there is no report of that. He didn't describe anything like that to me.

Ibid.

Dr. Pollak also testified that the overwhelming majority of disc herniations were atraumatic, and that when back pain occurred, people could not generally relate its onset to any specific incident. *Ibid*. He noted that the descriptions of Claimant's alleged injury in the records most proximate to the April 6, 2001 incident revealed that there was no specific trauma which caused Claimant's pain (Tr. 78). According to Dr. Pollak, "I don't think that it is likely at all that anything he did on that morning caused it." (Tr. 79). He analogized Claimant's onset of back pain to experiencing a heart attack at work. He testified:

> The defect in the disc was there. The defect in the annulus that allows the nucleus of the center portion to rupture out was there. It may have happened that morning. It may have happened the night before. It may have become symptomatic that morning. It probably did because he says that is when he first had symptoms, but there is nothing specific that he describes to me that he did that day that I believe mechanically was likely to have caused the problem.

[5] Dr. Pollak stated during his testimony that, although his report reflects a date of "4/16/2002," he was referring to the initial alleged injury on April 6, 2001. *Ibid*.; Tr. 108 He also stated that he believes that Claimant's symptoms started on "April 6, 2002," apparently referring to April 6, 2001 (Tr. 100; 102). However, the date noted in his report, April 16, 2002, is the date when Claimant started feeling sharp pain, which prompted him to agree to surgery (Tr. 37-38).

Ibid.

With regard to the mechanics typically involved in back injuries, Dr. Pollak testified that bending over is an activity commonly described by people who have disc herniations. *Ibid*. The act of bending over causes the spine to compress the front part of the disc which, in turn, causes the disc to extrude out the back where the pressure is less (Tr. 80). In contrast, the act of reaching up, he noted, extends, rather than compresses, the spine. *Ibid*. Dr. Pollak testified that, in his opinion, there is a 95 percent likelihood that Claimant's act of reaching up to hand a slip of paper through the open window of a yard hustler would not cause a disc herniation (Tr. 81).

In response to a hypothetical question from Employer's attorney regarding whether having a heart attack during the hearing would mean the hearing caused the heart attack, Dr. Pollak testified:

> Well, I'm not a cardiologist, but . . . the things that cause the heart attacks, the plaques in your arteries, and the other pre-disposing issues, if you will, existed when you walked into the room. You may get a little stressed in the courtroom. That may kind of push things a little bit toward the edge, but it is not as if being in the courtroom caused the heart attack. The heart attack was caused by the disease process that led to it.
>
> Similarly, with a lumbar spine injury, . . . while the disc herniation may have occurred at work from bending over and doing something, it was no more likely to occur at work than it is at home. And since we can't point to the specific time when it occurred, and he spends more time at home than at work typically, you would – I think it is more likely that it occurred at home than at work, but I can't point to it exactly. And I don't – as I say, I can't point to anything specific at work that specifically caused the disc herniation.

(Tr. 81-82). Dr. Pollak acknowledged that the act of reaching up, described by Claimant with respect to his April 6, 2001 incident, could aggravate an already irritated nerve root caused by a disc herniation (Tr. 82-83). He testified, however, that: "Those types of aggravations, if you will, tend to be self-limited and return back to their baseline, and not permanent changes in the nature of the symptoms." (Tr. 83).

On cross-examination, Dr. Pollak testified that orthopedic surgery involves the treatment of ailments of the musculoskeletal system, including ailments in the spine and extremities (Tr. 86). He described Claimant's condition as primarily a disc problem which had a secondary impact on his nervous system. *Ibid*. In addition to the professional activities previously described, Dr. Pollak testified that he teaches treatment and care of nerve injuries as an instructor in orthopedics at Johns Hopkins University (Tr. 87).

Among the medical records previously reviewed by Dr. Pollak was a medical report of Dr. Lancelotta who is a board-certified neurosurgeon (Tr. 87, EX 14, EX 23 at 4). Dr. Pollak agreed with Dr. Lancelotta's conclusion that Claimant's symptoms were genuine and related to a herniated disc at L4-5 on the left side (Tr. 88). He further agreed that surgery was reasonable

and necessary with respect to that condition, and that the herniated disc and surgery had nothing to do with Claimant's 1996 injury (Tr. 89). Dr. Pollak also agreed that trauma could aggravate a pre-existing disc impairment, but testified:

> I think that if you already have a herniated disc – let's say, for example, that the herniated disc had occurred that morning on his way to work. He had bent over and not felt anything, and the disc ruptured at that point, and he had – the disc was causing pressure on the nerve root and, as he explained, he was starting to get pain. If you stretch a nerve root that is already irritated by reaching up, that can cause the pain to worsen. That should not cause any permanent change in the natural history of the condition.

(Tr. 90).

When questioned about Dr. Slaughter's description of Claimant's activities as involving "extend[ing] his body in an upright lateral fashion" (CX 2), Dr. Pollak testified that it was his understanding Claimant was reaching up while standing on his toes but was not bending forward (Tr. 92-94). Although he initially testified that he did not think it was mechanically possible for a person to reach up to a truck window, as described by Claimant, and simultaneously flex the lumbar spine, he acknowledged that a demonstration of such an act by Claimant during the hearing involved both a reaching and forward bending component (Tr. 95-97). He did not believe, however, that it was probable that such an action would aggravate a pre-existing disc condition (Tr. 97). He explained the reason for his opinion was:

> Because I think that level of bending forward people do on a day to day basis, and that is no more likely to aggravate a disc condition than just getting out of his car. I mean, if that was going to do it, then it would have happened. I mean as you saw, that was very minimal bending forward, and in that day to day process of living we bend forward constantly. Typically, things that people see that more often than not that cause aggravations and conditions are substantial amounts of falling forward, twisting, and bending all the way forward.

(Tr. 98). He also did not believe it was likely that repeatedly engaging in the activity described by Claimant would aggravate a pre-existing disc condition. *Ibid*.

Dr. Pollak was unaware of any evidence that Claimant had a herniated disc prior to April 6, 2001, and knew, through his review of the medical evidence, that he did not have a herniated disc in 1996 (Tr. 100). He believed that Claimant could have had a herniated disc prior to April 6, 2001 and continued to work since most herniated discs are completely asymptomatic (Tr. 102). He further believed that Claimant's herniated disc became symptomatic on April 6th. *Ibid*. According to Dr. Pollak

> I think that April 6th is the first time that we have reported symptoms. There is no evidence of any symptoms prior to that. I do not believe that the '96 episode is related to this, and I think the symptoms began on April 6th, just as he says they did.

(Tr. 109).

According to a March 7, 2003 report by Dr. Pollak, he was asked by Employer's counsel to reevaluate Claimant, who had by that time returned to work, "with regard to his ability to perform the jobs of a Longshoreman and with regard to the footdrop condition that resulted from the initial surgical treatment of his lumbar disc problem." (EX 29). After examining Claimant on March 7, 2003, obtaining his account of his condition since the prior IME performed by Dr. Pollak on July 26, 2002, and reviewing relevant medical records, Dr. Pollak concluded that Claimant had sustained a repeat compression of the left L5 nerve root, caused by a recurrent disc herniation at L4-L5, and that Claimant had experienced some pain relief but only minimal improvement in his functional abilities. *Id*. at 2. He further wrote:

> I believe that the claimant's return of function in the left foot, albeit it non functional at this point, is more likely than not a result of progression of time since the original surgery and not necessarily resultant from the revision surgery of January 9, 2003. It is unlikely that any improvement would have occurred this quickly as a result of revision surgery.
>
> In terms of the claimant's return to work, I agree with his return without restriction with the exception of the fact that I still recommend that he use an ankle-foot-orthosis at work to decrease his risk of tripping and falling.

Id. at 3. Dr. Pollak opined that Claimant would continue to regain function in his left foot and that the foot drop condition would also improve. *Ibid*. He further wrote that Claimant's tolerance of the bumping and jarring associated with driving a yard hustler "will increase with time and that with progression of time he should be able to return to those functions." *Ibid*. With respect to his ability to operate a crane, Dr. Pollak also wrote: "Given the fact that only eight weeks have elapsed since his last lumbar surgery, I believe that it is likely that his tolerance of sitting in the position necessary to drive a crane will increase with time." *Ibid*.

D. Graham Slaughter, MD

In a letter dated September 4, 2002, Dr. Slaughter offered his opinion regarding the evaluation report prepared by Dr. Pollak on July 26, 2002 (CX 14). Dr. Slaughter stated that he disagreed with Dr. Pollak's opinion that Claimant could return to work as a gang foreman if he used a foot brace. He further noted that since Dr. Pollak opined that it would take Claimant eighteen months following the surgery to achieve MMI, it would be premature to evaluate Claimant's ability to return to work before the end of this period. Dr. Slaughter opined that even after eighteen months, Claimant would continue to have insufficient control of his left foot, which would render him incapable of working in an environment that involves uneven surfaces and other potential dangers. He stressed that the need for a foot brace speaks to the degree of Claimant's neurologic disability, and even with a brace Claimant would be at risk for tripping, falling, and injuring himself or others. Dr. Slaughter added that the degree of disc degeneration combined with post surgical changes in Claimant's lumbar spine resulted in a "physical support

situation that . . . will [not] be able to sustain the driving of a fifth wheel vehicle and/or frequent jostling in the truck." *Ibid.*

The record contains a number of brief notes authored by Dr. Slaughter (CX 15). On April 16, 2002, Dr. Slaughter wrote that Claimant was unable to work due to a ruptured disc apparently at L4-L5 and needed surgery. Dr. Slaughter's notes dated August 19, 2002 state that Claimant was unable to work due to a foot drop, and he prescribed a foot drop brace. Yet another note dated November 18, 2002 states that Claimant would not be able to work from that date through January 6, 2003 and that he required additional surgery.

The record also contains an "operative/procedure note" dated April 30, 2002, which describes Claimant's surgery performed by Dr. Slaughter on that date (CX 16). The note reflects a preoperative diagnosis of a ruptured lumbar disk at L4-5 and a postoperative diagnosis of a ruptured L5-S1 disk with free fragment overlying the body of L4. It describes the surgery as a laminectomy of L4, L5 with removal of a ruptured disk at L4-5 as well as at L5-S1 interspaces with decompression of the S1, L5 and L4 nerve roots.

An MRI report addressed to Dr. Slaughter indicates that Claimant underwent an MRI of the lumbar spine with and without contrast on November 11, 2002 (CX 19). It states that an MRI was performed because Claimant had had a previous lumbar surgery at L4-5 and was complaining of recurrent or persistent pain. It also states that correlation was made to the prior examination dated April 20, 2002. According to the November 2002 report, the findings were suggestive of persistent or recurrent large left paramedian disc extrusion at L4-5. Also, an inferior migration of the disc fragment to the lateral recess of L5 was noted as well as a focal central stenosis with left lateral recess or neuroforamina stenosis. A persistent small central or right sided disc herniation at L5-S1 was also observed. Finally, small right paramedian disc herniation at L3-4 was noted.

The "operative/procedure note" for a second surgery performed by Dr. Slaughter on January 9, 2003 specifies a pre- and post-operative diagnosis of recurrent ruptured lumbar disk at L4-5 (CX 17). It describes the procedure as a laminectomy of L5 and part of L4 with extraction of a large ruptured disk at L4-5 overlying the L5 vertebral body.

Claimant also offered into evidence a bill[6] issued by Dr. Slaughter's office dated July 10, 2002, which states that the following claims remained unpaid:

4/30/2002 – 63047/63048 -- $5,565.00
4/16/2002 – 99214 -- $100.00
6/20/2001 – 99245 -- $225.00

$5,890.00

(CX 21).

[6] This document is not a "bill" in a strict sense of this word, but rather a "memo" on letterhead from Dr. Slaughter's office. The memo also states that these claims were sent to the Schaffer Co. on May 17, 2002. *Ibid.*

Other Evidence

Employer also submitted into evidence the following exhibits, which are not further described above but which have been considered by me in deciding this claim:

A fax transmission sheet dated April 25, 2001 from Beth Straw-Thomas to Chuck Colgan to which is attached a note from Claimant's treating physician dated April 25, 2001 and an MRI report dated May 20, 1996 (EX 21).

A January 17, 2002 letter from Employer's counsel to Dr. Ira L. Fedder (EX 22).

A July 18, 2002 report of Updated Video Job Analyses for the Longshoreman jobs of Yard Hustler/5th Wheel Driver, Crane Operator, Foreman, and Gang Carrier/Leader (EX 25).

An October 11, 2002 letter from Employer's counsel to District Director Emma Riley requesting Section 8(f) relief (EX 26).

A copy of the January 17, 2002 transcript of hearing before Judge Chapman (EX 27).

A "Notice of Final Payment or Suspension of Compensation Payments" indicating that Claimant was paid temporary total disability benefits from April 25, 2001 to June 24, 2001 (EX 28).

The transcript of Claimant's March 6, 2003 deposition by Employer's counsel (EX 30)

A "GAI Transcript Inquiry" print out from the Steamship Trade Association of Baltimore, Inc. showing hours worked by Claimant for the period February 24, 2003 through March 19, 2003 (EX 31).

DISCUSSION

Section 22 of the LHWCA provides that any party may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. 33 U.S.C. § 922. Traditional notions of res judicata do not apply, and Section 22 modification proceedings may be brought whenever changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the Act. *Bath Iron Works Corp. v. Director, OWCP, (Hutchins)*, 244 F.3d 222 (1st Cir. 2001); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). To that end, the trier of fact is given wide discretion to modify a compensation order. *O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971). Modification proceedings are especially broad insofar as they permit the correction of mistaken factual findings. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497 (4th Cir. 1999). Any mistake of fact may be corrected whenever justice requires, whether based on cumulative evidence, wholly new evidence, or merely further reflection on the evidence initially submitted. *Id*.

A request for modification need not be formal, and may be written or verbal so long as it indicates a clear intention to seek modification. *See I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 527 (4th Cir. 1996), *cert denied*, 519 U.S. 807 (1996) (letter, requesting modification, is sufficient if it contains statement of intent to seek compensation for a specific injury and is clear and informative enough that district director recognizes the request and takes proper action to initiate proceedings). Such an intent is demonstrated by a reference to "any change in claimant's condition, to a mistake of fact in the earlier order, to additional evidence concerning the claimant's disability, to dissatisfaction with the earlier order, or to anything that would alert a reasonable person that the earlier compensation might warrant modification." *Id*.

In a letter dated September 13, 2002 from Employer's counsel to the District Director, a copy of which was also sent to Claimant's attorney, Employer alleged that the decision of Judge Chapman of May 7, 2002 was erroneous with respect to her finding that Claimant's condition was related to his prior work injury. Employer therefore sought modification of that decision pursuant to Section 22 of the Act. Since Employer's request for modification was filed less than a year after Judge Chapman's decision, and clearly asserts entitlement to modification of that order under Section 22, I find that such request was timely filed and adequately asserted.

A. Injury Arising Out of and In the Course of Employment.

As noted previously, Employer asserts that the 2002 decision of Judge Chapman must be modified because she made a mistake of fact in determining that Claimant sustained a work-related compensable injury on April 6, 2001 (Emp. Br. at 23-29). In her 2002 decision, Judge Chapman found that Claimant "suffered a harm or injury, in other words, back pain, on April 6, 2001, during the course and scope of his employment." *Wozniak*, 2001-LHC-3365 at 12. Employer argues "that the Claimant's work activities did not cause the herniated disc for which he had surgery on April 30, 2002, and January 9, 2003, and thus did not cause his disability." (Emp. Br. at 1). For the reasons stated below, I deny Employer's request for modification with respect to this finding.

The LHWCA provides that, absent substantial evidence to the contrary, a claim for benefits comes under the provisions of the Act. 33 U.S.C. § 920(a). The claimant must establish a *prima facie* case by proving that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). *See U.S. Indus./Fed. Sheet Metal v. Director., OWCP (Riley)*, 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Indus./Fed. Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). The claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused the alleged harm; rather, the claimant must show that working conditions existed which could have caused the harm. *See generally U.S. Indus./Fed. Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS at 631. A claimant's credible subjective complaints of pain alone may be sufficient to establish the injury element of the *prima facie* case even though there is no objective findings that claimant is harmed. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

If Claimant establishes a *prima facie* case, the presumption is created under Section 20(a) that the employee's injury arose out of employment. To rebut the presumption, Employer must present substantial evidence proving the absence of or severing the connection between such harm and employment. *Parsons Corp. of California v. Dir., OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Mgmt. Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). Substantial evidence is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969).

In the present case, I find that Claimant began to experience pain while working for Employer on April 6, 2001 as a result of a nerve compression caused by a herniated disc at L4-L5, and that Judge Chapman's determination was therefore not the result of a mistake of fact. The following evidence of record supports such a finding.

First, when Claimant underwent an MRI in 1996 after his previous on-the-job back injury, he was shown to have narrowing of the L5-S1 disc interspace with a bulge more severe on the right side. EX 9. There was no evidence at that time of any bulging disc or nerve impingement in the area of L4-L5. *Ibid*. Thus, there is absolutely no objective medical evidence of record that Claimant had a herniated L4-L5 disc at any time prior to April 6, 2001. *See* EX 6 at 3, Tr. 89, 100.

Second, Claimant testified before me at the formal hearing on April 9, 2003, as he did at the hearing before Judge Chapman in January 2002, that he returned to work after his 1996 back injury and worked without difficulty performing, without lumbar support, a variety of activities requiring constant bending and climbing (Tr. 29-30). Claimant also testified that he began to experience low back pain on April 6, 2001 when he was working as a foreman handing out slips of paper to truck drivers directing them to various locations to pick up and drop off containers (Tr. 28). The pain he felt was "sharp" and went down the left side of his "backside" to his left foot. *Ibid*. He reported his back pain to Employer's superintendent, Leo Finn, that day, and, when the pain continued throughout the weekend, he made an appointment with Dr. Fedder's office and was examined by him on April 11, 2001 (Tr. 34, EX 6). He continued to work up to and including April 24, 2001, but the pain kept getting worse and reached a point where it was extremely difficult to lift his left leg (Tr. 33). Claimant did not want to undergo surgery at that time, recommended as one option by Dr. Fedder, and instead agreed to nerve block treatments which helped somewhat until around April 16, 2002 (Tr. 34). On June 20, 2001, he refused another recommendation for surgery, made this time by Dr. Slaughter, and returned to work on June 24, 2001. He continued to experience back pain, which gradually increased in severity, and on April 16, 2002 he again felt "real sharp pains running down the [left] leg" (Tr. 37-38). When he saw Dr. Slaughter again, he finally agreed to undergo back surgery which occurred on April 30, 2002 at Union Memorial Hospital (Tr. 39). Having observed Claimant's testimony and demeanor at trial, and having reviewed the contemporaneous medical records with respect to his back condition, I find Claimant's description of the events of April 6, 2001 to be entirely credible and believable.

Third, Dr. Pollak has opined, in part, that Claimant's disk herniation at L4-L5 occurred when Claimant was either at work or not at work (EX 23 at 6). This aspect of his opinion, however, fails to aid in any way my inquiry regarding the issue of when Claimant sustained an

injury since it simply states the obvious. The remainder of Dr. Pollak's opinion is simply that it is more likely Claimant sustained a herniated disk when not at work because he spent more time away from work than at work and because he failed to report "any work related accident that could have possibly caused the disc herniation." *Ibid*. However, this opinion is inconsistent with other statements and testimony by Dr. Pollak regarding the onset and cause of Claimant's back condition.

Dr. Pollak acknowledged that Claimant's herniated L4-L5 disc and subsequent back surgery had nothing to do with his 1996 injury, and he also agreed that there was no medical evidence of a herniated L4-L5 disc before April 6, 2001 (Tr. 89, 100). Dr. Pollak further stated that the majority of disc herniations are atraumatic, and that when back pain occurs, people generally cannot relate its onset to any specific incident (Tr. 77). Yet in clear contradiction of these statements, he testified that be believed Claimant could not have sustained a herniated disc while at work on April 6, 2001 because he reported no "specific incident . . . of a popping, of a sudden onset of pain, of a sharp sudden changing condition" or of having "slipped on the water and bent over and fallen . . . ." *Ibid*. Since, as Dr. Pollak stated, most discs become herniated without trauma, the absence of any specific slipping, falling, or bending, is of absolutely no consequence in determining whether Claimant sustained a herniated disk on April 6, 2001. Furthermore, as noted above, Claimant credibly testified that the pain he felt on April 6, 2001 was "sharp" and went down the left side of his "backside" to his left foot (Tr. 28). Thus, Claimant's testimony supports a conclusion that his disc became herniated on April 6, 2001 if, as Dr. Pollak testified, a "specific incident . . . of a sudden onset of pain, of a sharp sudden changing condition" is an indicator of a herniated disc.

Similarly, if, as Dr. Pollak has also stated, most herniated discs are completely asymptomatic (in addition to being atraumatic), Claimant's L4-L5 disc could have become herniated at any time or place without trauma, without his knowledge, and without impairing his ability to work (Tr. 102). It is simply speculative, given the facts of this case, to assume that Claimant's disc became herniated when he was not working because he spent less time at work than away from work.[7]

Finally, Dr. Pollak has expressly accepted as true the uncontradicted fact that Claimant first began to experience low back pain radiating into his left leg while at work on April 6, 2001, and stated that such pain is symptomatic of a herniated disc which impinges on a nerve root (Tr. 109). Since there is no evidence that Claimant experienced low back or left leg pain prior to beginning work on April 6, 2001, and in light of the inconsistencies in Dr. Pollak's statements regarding this issue, I find the evidence supports a conclusion that Claimant sustained a herniated disc at L4-L5, with encroachment on the left neural foramen, on that date. I thus find that Employer has failed to rebut the Section 20(a) presumption that Claimant's injury arose out of and in the course of his employment with Employer. Based on this determination, I further find

[7] Clearly, Dr. Pollak does *not* say that Claimant's disc did not become herniated that day. He testified: "It may have happened that morning. It may have happened the night before." (Tr. 79). The simple fact is, Dr. Pollak could not say when Claimant's disc herniation occurred.

that Employer has failed to establish a mistake of fact in the prior decision by Judge Chapman which would warrant modification under Section 22 of the Act.[8]

B. Whether Claimant was temporarily and totally disabled from April 16, 2002 through February 24, 2003 due to a work-related injury.

I note as a preliminary matter that Employer's post-hearing brief omits entirely any allegation or argument with respect to whether Claimant was temporarily and totally disabled from April 16, 2002 through February 24, 2003.[9] Similarly, Employer's counsel stated at the formal hearing that the issue of temporary total disability was being contested solely on the ground that Claimant sustained no work-related injury which could have caused his disability (Tr. 9). However, in response to an objection from Claimant's attorney regarding the admissibility of a job analysis by Mark Dennis (EX 25), Employer's counsel further stated that the report was relevant to whether Claimant could return to his prior employment after Dr. Pollak opined in July 2002 that Claimant could perform his prior duties if he wore a foot and ankle brace (Tr. 16, EX 23). Furthermore, Claimant's attorney has clearly raised the issue of whether Claimant was entitled to additional temporary total disability benefits in his pre-hearing submissions, and this issue was expressly addressed in his post-hearing brief. I thus consider the issue to be disputed by the parties and properly raised in this proceeding as an initial claim for additional disability compensation. For the reasons explained below, I further find that Claimant is entitled to temporary total disability compensation for the period April 16, 2002 to February 24, 2003.

Disability is defined under the LHWCA as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Harrison v. Todd Pacific Shipyards Corp*., 21 BRBS 339 (1988); *Elliott v. C & P Telephone Co*., 16 BRBS 89 (1984).

The judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp*., 22 BRBS 100 (1988); *Mills v. Marine Repair Serv.*, 21 BRBS 115, *on recon*., 22 BRBS 335 (1988); *Carroll v. Hanover Bridge Marine*, 17 BRBS 176 (1985); *Bell v. Volpe/Head Constr. Co.*, 11 BRBS 377 (1979).

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[8] I also find that Employer's reliance on *Ortco Contractor, Inc. v. Charpentier*, 332 F.3d 283, 290-92 (5th Cir. 2003) in support of its argument that Dr. Pollak's opinion rebuts the Section 20(a) presumption in this case is misplaced. In *Ortco*, the Fifth Circuit held that it was improper to require an Employer to "rule out" the possibility of a causal connection between the injury (in that case, a heart attack) and the claimant's employment. The three physicians relied upon by the employer there all agreed that the claimant's heart attack began the previous evening, while he was at home, and that the heart attack process simply concluded fifteen minutes after the claimant arrived at work the following morning. *Charpentier*, 332 F.3d at 286. In reaching its conclusion, the *Ortco* court expressly distinguished its prior decision upholding an award of benefits in *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998), another heart attack case, based on the fact that the claimant's heart attack in that case *began* on the job and only the cardiac disease predated the injury. *Id*. at 291. In the instant case, Claimant's injury, *i.e*., back pain indisputably began at work and, according to Dr. Pollak's own testimony, such pain only results from a herniated disc when the disc begins to impinge on the nerve root.

[9] At the time of the hearing before Judge Chapman, Employer stipulated that Claimant was temporarily and totally disabled from April 25, 2001 to June 24, 2001.

"Usual" employment is the claimant's regular duties at the time that he was injured. *See Ramirez v. Vessel Jeanne Lou, Inc.,* 14 BRBS 689 (1982). The claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. *Elliott*, 16 BRBS 89. The claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978).

If the employee establishes his *prima facie* case, the burden then shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd, Sea Tac Alaska Shipbuilding v. Dir., OWCP*, 8 F.3d 29 (9th Cir. 1993). Should the employer fail to satisfy its burden, the extent of claimant's disability will be deemed total. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

At the time of the formal hearing in April 2003, Claimant testified that he was unable to return to work after the surgery performed on April 30, 2002 by Dr. Slaughter at Union Memorial Hospital (Tr. 38-39). When asked why he was unable to work, he testified:

> Because the leg was still weak, and I was still having pain shooting down the leg, and it – I was – it was just real gentle, I mean, real tender like. It was hurt. It still was – all the pain was there.
> . . . .
> [The surgery] took some of the sharp pains away, but it didn't take all the pain away.

(Tr. 39). When asked to explain why he could not have returned to work if he had a leg brace, he responded:

> Well, the leg was weak. I still was dragging the leg more or less, and Dr. Slaughter said about the brace, he said if you put a brace on it, you ain't going to build that muscle back up. You ain't going to build the nerve, give the nerve – you wouldn't be working your foot. You would be dependent on that brace.

(Tr. 40). Claimant continued to experience pain and walked with a limp at the time of the hearing (Tr. 41).

Between June 20, 2001 and February 24, 2003, Claimant was examined by Dr. Slaughter with respect to his on-going complaints of back and left lower extremity pain (CX 13, CX 20). Dr. Slaughter is board-certified in neurologic surgery, is Chief of Neurosurgery at Union Memorial Hospital, and is on the medical staff of Children's Hospital, Johns Hopkins Hospital, and St. Joseph Medical Center (CX 11).

On June 20, 2001, Dr. Slaughter examined Claimant and noted, *inter alia*, that he had limited range of motion of the lumbar spine, he experienced radicular pain down into his left lower extremity, and he had weakness of the extensor hallucis longus associated with decreased pain in the L5 dermatome on the left foot (CX 13 at 1). Dr. Slaughter stated that Claimant was a surgical candidate and opined that it was unlikely he could "sustain a work profile . . . ." *Ibid*.

Claimant was seen again on April 16, 2002 by Dr. Slaughter who found "total restriction in range of motion in forward bending as well as hyperextension with a markedly positive straight leg raising on the left side" related to his April 6, 2001 injury (CX 13 at 2). Based on his examination, Dr. Slaughter ordered a repeat MRI scan and proceeded to schedule him for surgery. *Ibid*.

On April 30, 2002, Dr. Slaughter performed a laminectomy of L4-L5 with removal of a ruptured disk at that level and at L5-S1 with decompression of the L4, L5, and S1 nerve roots (CX 16).

On August 19, 2002, when Dr. Slaughter again examined Claimant, he wrote:

> Mr. Wozniak comes in with his lumbar back pain improved but he continues with a significant foot drop of his left foot. He finds himself tripping on his foot often. He is unable to return back to his job as a longshoreman because of the neurologic deficit. He was given a prescription for a foot drop brace and I will see him again in three months.

CX 13 at 3.

On November 18, 2002, after reviewing his clinical situation and a recent MRI scan, Dr. Slaughter again recommend surgery after concluding that Claimant had re-ruptured the disc at L4-L5 which had originally been injured on April 6, 2001 (CX 13 at 4, CX 18).

A second laminectomy of L5 and part of L4 was performed by Dr. Slaughter on January 9, 2003 (CX 17).

On February 24, 2003, Dr. Slaughter again examined Claimant and found he had good range of motion of the lumbar spine and "most importantly without any significant radicular radiation." (CX 19). He wrote that Claimant was "doing fairly well" despite having "some intermittent lumbar pain especially when he strains too much but he desires to return to work." *Ibid*. Dr. Slaughter thus released Claimant to return to work on February 24, 2003. *Ibid*.

Employer offers in response to Dr. Slaughter's opinion regarding Claimant's inability to work, a July 26, 2002 report by Dr. Pollak in which he states:

> Given his complete foot-drop on the left, I believe that he is at risk for falling with ambulation as long as he is not wearing an ankle-foot orthosis ["AFO"]. I believe that it is unsafe for him to return to any occupation that requires working at unprotected heights or where tripping could result in falling from a significant

> height unless he is wearing an [AFO]. After review of the video job analyses of foreman, gang carrier, crane operator, and yard hustler/5th wheel operator, I believe that there are certain requirements of those jobs that would make them unsafe to perform with an un-braced foot drop such as the one the claimant has. These requirements include climbing a ladder to and from the crane cab; walking at unprotected heights or in other environments where tripping over things could be particularly dangerous such as heavy truck traffic areas; and climbing on and off of the yard hustler.
>
> I believe that the claimant would benefit from use of an [AFO] to control his foot-drop. If he would wear an AFO and become proficient with ambulating in the orthosis, then he would be able to return to work in the job of gang foreman as he has specifically described it to me. I further believe that with the use of the AFO, the claimant should be able to perform all of the tasks of a crane operator, yard hustler/5th wheel operator, gang carrier, or foreman as described in the video tapes reviewed.
>
> . . . .
>
> In summary, I believe that while Mr. Wozniak remains unable to work because of a foot drop on the left secondary to a herniated intervertebral disc, I do not believe that intervertebral disc injury was in any way work related. I believe that he could return to work as a gang foreman with the job requirements he described to me if he were wearing an [AFO] and was trained in ambulation in the orthosis. I believe that he is currently capable of returning to work in a sedentary capacity that does not involve work at unprotected heights. I see no medical reason that he could not return to work driving a vehicle such as a yard hustler with an automatic transmission at this time.

(EX 23 at 7-8).

In a September 4, 2002 letter to Claimant's attorney, Dr. Slaughter wrote that he had reviewed Dr. Pollak's July 26, 2002 report (CX 14). He wrote, in relevant part:

> It would be my opinion that Mr. Wozniak will not regain enough control of his left foot even in the eighteen month period [identified by Dr. Pollak as the amount of time following surgery needed by Claimant to reach MMI] such that he would be able to maneuver safely at a job that requires [ambulating on] uneven surfaces in an environment with potential dangers to himself and fellow workers. The need of a foot drop brace speaks to the degree of his neurologic disability and *even with the brace* it is a compromise situation that provides great opportunity for tripping and falling resulting in further personal injury to himself and/or others. It would also be my opinion that the degree of disc degeneration plus post surgical changes in his lumbar spine creates a physical support situation that I do not think will be able to sustain the driving of a fifth wheel vehicle and/or frequent jostling in the truck and/or that vehicle.

Ibid. (italics added).

In March 2003, Employer's attorney again asked Dr. Pollak to evaluate Claimant (EX 29). As noted above, Dr. Pollak conducted a follow-up IME on March 7, 2003, after Claimant had returned to work, in which he determined that Claimant had sustained a repeat compression of the left L5 nerve root and had experienced "some pain relief [post surgery] but . . . only minimal change in function thus far." *Id*. at 2. Dr. Pollak determined that Claimant's left foot was non functional, although he believed that whatever function had returned at that point was "more likely than not a result of progression of time since the original surgery and not necessarily resultant from the revision surgery of January 9, 2003." *Id*. at 3. He agreed with Dr. Slaughter's release of Claimant to work on February 24, 2003 without restrictions, although he recommended use of an ankle-foot-orthosis to decrease the likelihood of tripping and falling. *Ibid*. Dr. Pollak also believed that Claimant's tolerance for activities associated with operating yard hustlers and cranes would "increase with time." *Ibid*.

Employer has also submitted a July 18, 2002 report prepared by Mark E. Dennis, M.Ed., C.R.C., Vocational Case Manager, which describes the job duties and physical activities associated with the Longshoreman positions of Yard Hustler/5th Wheel Driver, Crane Operator, Foreman, and Gang Carrier/Leader (EX 25), all of which were previously performed by Claimant. According to the job analysis report for the position of Gang Carrier/Leader, that position involves, *inter alia*, walking, standing, and lifting up to 50 pounds from one to three hours during an eight hour shift. *Id*. at 13-14. The position may also periodically require the individual to perform a number of physical duties in the terminal area including assisting with lashing in container boxes, driving yard hustlers, and working as a crane operator. *Ibid*. The job of Foreman/Longshoreman requires the individual stand and walk from six to eight hours during an eight hour shift in the loading and unloading area of the dock directing drivers according to a vessel loading and unloading plan. *Id*. at 15-16. The Crane Operator position requires, *inter alia*, working with hands at waist level for six to eight hours, climbing two sets of vertical steel ladders for less than one hour, and walking on a cat walk 110 feet off the ground. *Id*. at 17-18. Yard Hustler/5th Wheel Drivers must be able to, *inter alia*, check tires for inflation, climb up a three or four foot step, pull themselves into the driver's cab, drive for six to eight hours, including maneuvering the vehicle backward into locking position with container box/chassis and then exiting the cab to hook up brake and air lines to container/chassis. *Id*. at 19-20. The position further requires that the driver be able to walk from one to three hours. *Ibid*.

It is undisputed that prior to his April 6, 2001 injury, Claimant worked as a gang carrier and foreman, and also performed the jobs of a crane operator, tractor driver, and lasher, as well as other general longshoreman jobs (Tr. 27). It is also undisputed that Claimant was temporarily and totally disabled from performing those jobs from April 25, 2001 to June 24, 2001 (CX 22 at 9), and that he did not work from April 16, 2002 to February 24, 2003 based on his ongoing complaints of back pain and left foot drop. It was the opinion of Dr. Slaughter, based on his examination and treatment of Claimant during the relevant time period, that Claimant could not

work. As noted above, Dr. Slaughter determined on April 16, 2002, with respect to Claimant's lumbar spine, that Claimant had "total restriction in range of motion in forward bending as well as hyperextension with a markedly positive straight leg raising on the left side" related to his April 6, 2001 injury (CX 13 at 2). Based on this examination, he performed surgery on Claimant two weeks later on April 30, 2002. When he next examined Claimant on August 19, 2002, he found that his lumbar back pain had improved but stated that Claimant continued to experience "a significant foot drop of his left foot" causing him to trip frequently (CX 13 at 3). Dr. Slaughter determined at that time that Claimant was unable to return to his job as a longshoreman because of the neurologic deficit in his left lower extremity, and ordered a foot brace. *Ibid*. When he again saw Claimant three months later on November 18, 2002, he recommend a second surgery after concluding that Claimant had re-ruptured the same L4-L5 disc originally injured on April 6, 2001 (CX 13 at 4, CX 18). That surgery was performed by Dr. Slaughter on January 9, 2003 (CX 17), and, on February 24, 2003, Dr. Slaughter finally released Claimant to return to work (CX 19).

As noted above, Dr. Slaughter is board-certified in neurologic surgery, and occupies, among others, the position of Chief of Neurosurgery at Union Memorial Hospital (CX 11). He has been Claimant's treating physician throughout the relevant time period, and is the individual who performed surgeries on Claimant's back on two occasions to correct, *inter alia*, the nerve root compressions at L4, L5, and S1 responsible for his left foot-drop (CX 16-17). He is thoroughly familiar with Claimant's medical condition, and I find his opinion is entitled to great weight.

Dr. Slaughter makes clear the fact that the eighteen-month period following surgery (acknowledged by Dr. Pollak to be the amount of time needed before Claimant would likely reach MMI) is a transition phase during which Claimant's activities should be limited to allow for the natural healing process to occur (CX 14). He further states that "deciding whether or not [Claimant] can return back to his former job or not should require the eighteen months that [Dr. Pollak] considers necessary before such an evaluation can be accomplished." *Ibid*. Dr. Slaughter notes that Claimant's ability to ambulate, *even with a foot drop brace*, "is a compromise situation that provides great opportunity for tripping and falling resulting in further personal injury to himself and/or others." *Ibid*. Not only does walking pose a hazard to Claimant's safety, but, according to Dr. Slaughter, driving or riding in a yard hustler risks further spinal injury given "the degree of disc degeneration plus post surgical changes in [Claimant's] lumbar spine . . . ." *Ibid*.

I find Dr. Pollak's opinion that Claimant was not totally disabled from July 26, 2002 until he returned to work on February 24, 2003 less persuasive than the opinion of Dr. Slaughter for several reasons. First, Dr. Pollak did not suggest in his July 26, 2002 report that Claimant was capable of returning to his full range of duties if he wore a foot and ankle brace, but rather opined only that if Claimant would "wear an AFO and become proficient with ambulating in the orthosis" through proper training he could return to work at some indefinite point in the future (EX 23 at 7).[10] During the hearing, Dr. Pollak stressed that Claimant "had to become proficient

[10] The evidence is ambiguous on the issue of whether, and to what extent, a foot brace would enable Claimant to perform his pre-injury duties between July 26, 2002 and the time of his second surgery on January 9, 2003. Claimant testified that he could not return to work with a leg brace because following the April 30, 2002 surgery, his

in the use of [the AFO], and that you just can't put it on him and send him to work" (Tr. 84). However, he never explained how long this process would take, nor did he opine that Claimant would have become proficient in its use between the time it was prescribed by Dr. Slaughter on August 19, 2003 and when Dr. Slaughter determined that Claimant had re-ruptured his L4-L5 disc on November 18, 2002 (CX 13 at 3-4). Likewise, his report of the follow-up IME in March 2003 makes clear that the use of an AFO would not eliminate the risk of injury, *i.e.*, he noted that use of such a devise at work would only "decrease his risk of tripping and falling." (EX 29 at 3). Furthermore, Dr. Pollak acknowledged in July 2002 that Claimant had a substantial neurological deficit in his foot, and that returning to work without a brace posed a serious risk of additional injury (Tr. 83-84). In March 2003, he noted that Claimant had regained some function in his left foot since the initial surgery, but he also described the foot at the time of that examination as "non functional" (EX 29 at 3). His March 2003 report further recognizes, for the first time, that Claimant's post-surgical lumbar spine condition is not yet completely stable and that Claimant will build up tolerance for certain activities only after he is given sufficient time to heal. *Ibid*. Finally, neither of Dr. Pollak's reports adequately address Claimant's testimony that he continued to experience pain following the first surgery (EX 29; Tr. 39). Although his July 2002 report acknowledges Claimant's ongoing complaints of low back and left leg pain (EX 23 at 2), his assessment of Claimant's ability to return to work addresses only his left foot-drop condition. *Id*. at 7-8. He similarly notes in his March 2003 report that Claimant's condition worsened dramatically after the July 2002 evaluation and that, even after the January 9, 2003 surgery, he continued to experience substantial pain in the left leg and foot which "worsened with activities such as prolonged standing and walking." (EX 29 at 1). The follow-up IME report offers no opinion or assessment whatsoever of Claimant's ability to perform his prior Longshoreman duties before March 7, 2003, and only reflects Dr. Pollak's agreement that Claimant could return to work on February 24, 2003. *See id*. at 2-3.

In light of the foregoing evidence, including Claimant's recurrent disc herniation, his credible testimony regarding continued pain and left foot drop following both surgeries, the physical activities associated with each of the jobs described in the job report prepared by Mark Dennis,[11] and the lack of any persuasive evidence that Claimant was able to return to his full

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left leg was weak and he was still dragging it, and because Dr. Slaughter had indicated to him that if he were to wear a foot brace, he would not re-build the muscle and would be dependent on the brace (Tr. 39-40). According to Dr. Pollak, this consequence could have been avoided by taking the brace off several times a day and exercising (Tr. 85). In fact, Dr. Slaughter prescribed a brace to Claimant on August 19, 2002 (CX 13), but stated on September 4, 2002 that it would not enable Claimant to return to all of his job duties (CX 14).

[11] As described above, the job of Crane Operator requires climbing two sets of vertical ladders, as well as walking on a catwalk which is 110 feet above ground, to gain access to the operator's cab. Dr. Pollak did not explain in his July 2002 report how an individual wearing an AFO could safely perform these functions without serious risk of injury to himself or others. Nor did Dr. Pollak discuss how Claimant, in light of his low back pain and unstable left foot, could maneuver a yard hustler in and out of the yard for six to eight hours as he hooked and unhooked containers to transport to and from the loading area. Similarly, his July 2002 report does not discuss the impact on his lumbar spine or left lower extremity condition of the bouncing and jostling attendant with the Yard Hustler driver job, the six to eight hours of walking and standing associated with the Foreman job, or the one to three hours of standing and walking, and lifting up to 50 pounds, involved in the Gang Carrier/Leader job. In contrast, Dr. Slaughter explained, based on his treatment of Claimant and his knowledge of Claimant's condition, that Claimant lacked sufficient control of his left foot to maneuver safely in any job that posed a risk of tripping and falling, and that his lumbar spine was unstable and rendered him incapable of driving or riding in a yard hustler (CX 14).

range of duties prior to the time he was released to work by Dr. Slaughter, I find that Claimant has established a *prima facie* case of total disability for the entire period from April 16, 2002 through February 24, 2003.

As noted above, once a claimant establishes a *prima facie* case of total disability, the burden then shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92. Should the employer fail to satisfy its burden, the extent of claimant's disability will be deemed total.

The only jobs which have been identified by Employer as suitable for Claimant during the relevant time period are the jobs performed by Claimant prior to his April 6, 2001 injury. These jobs, as discussed above, were beyond the physical capabilities of Claimant from April 16, 2002 to February 24, 2003. Employer has thus failed to satisfy its burden of showing the availability of suitable alternative employment, and I therefore find that Claimant was temporarily and totally disabled for that entire period.

C. Whether Employer is responsible for the medical bills of Dr. D. Graham Slaughter.

In his Post-hearing Brief, Claimant argues that a bill for services provided by Dr. Slaughter, which was submitted to Employer's representative on May 17, 2002, remained unpaid (Cl. Br. at 13). The bill offered into evidence by Claimant is dated July 10, 2002 and states that the following claims have not been paid:

4/30/2002 – 63047/63048 --	$5,565.00
4/16/2002 – 99214 --	$ 100.00
6/20/2001 – 99245 --	$ 225.00

	$5,890.00

(CX 21). In his Pretrial Statement, Claimant also indicated that at that time he had outstanding medical bills for the second surgery performed by Dr. Slaughter on January 9, 2003 (Cl. Pretrial Statement at 1).

During the April 9, 2003 hearing, Employer acknowledged that if a causal relationship was established "between the work injury and the need for the surgery, then we would agree Dr. Slaughter's bills were due to the surgery, and then therefore we would be liable for it" (Tr. 13). Employer explained that it only disputed the "causal link," but not the Section 7 compliance issues, such as authorization. *Ibid.* Thus, based on my previous finding that Claimant's disability and associated treatment are causally related to his work-related injury, Employer is responsible for the ensuing medical expenses, including the medical bills of Dr. D. Graham Slaughter (CX 21).

D. Claimant's Average Weekly Wage.

Section 10 of the LHWCA provides three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d) of the Act, to arrive at an average weekly wage. The methods of computation described in the Act are directed towards establishing a claimant's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). A percentage of the employee's average weekly wage is the claimant's compensation rate, subject to the maximum and minimum compensation rates established under Section 6. *See, e.g., Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

Section 10(a) of the Act applies if the claimant "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, *supra*., 936 F.2d 819; *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135-36 (1990); *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986). Where Section 10(a) is inapplicable, Section 10(b) must be considered before resorting to application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncanson-Harrelson Co., supra*., 686 F.2d at 1342; *Duncan, supra*., 24 BRBS at 136; *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979). Section 10(c) is a general, catch-all provision applicable to cases where the methods described in subsections (a) and (b) cannot realistically be applied. Theoretically, Section 10(c) should be used in cases when actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage-earning capacity of the claimant. *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 92-93 (1987).

In her 2002 decision and order, Judge Chapman concluded that Section 10(c) of the Act should govern the determination of Claimant's average weekly wage in this case. Judge Chapman's legal and factual analysis of this issue is thorough and accurate, and I find no reason to disturb her findings on this issue. She first determined, based on extant case law, that an ALJ must consider both the length and nature of the claimant's employment in determining whether an employee's average weekly wage should be calculated according to Section 10(a) or (10(c). *Wozniak*, 2001-LHC-3365 at 14. She then examined the record evidence relating to Claimant's wages. She wrote:

> In this case, the records from the Steamship Trade Association reflect that the Claimant worked 222 of the 365 days preceding his injury, or 61% of the year. However, a review of those records shows that the Claimant's work schedule was erratic, and there were days and even weeks when he did not work. According to

> the Claimant, he works when there is a job available, whether it is for the Employer, or whether he is "shaking" out of the union hall.

Id. at 14-15. She further determined that Claimant's wage statements revealed "vast differences in his amount of income from week to week," and she thus found it "impossible . . . to conclude whether the Claimant's average weekly wage would be based on either a five-day work week or a six-day work week." *Id*. at 15. Based on her inability to draw any reasonable inference from Claimant's wage records regarding the regularity of his work schedule, Judge Chapman found that it would be neither fair nor reasonable to apply Section 10(a) of the Act when calculating Claimant's average weekly wage. *Ibid*. Since neither party had submitted evidence of wages earned by any employee of the same class as Claimant, Judge Chapman further determined that Section 10(b) could not be utilized. *Ibid*. She thus found application of Section 10(c) was most appropriate for calculating Claimant's average weekly wage in this case. *Id*. at 16.

In his post-hearing brief, Claimant argues that Judge Chapman improperly refused to calculate his average weekly wage based on the income reflected in his 2000 federal tax return (*i.e.*, by dividing this figure by 52). However, Judge Chapman's refusal to prorate Claimant's 2000 wages was clearly appropriate. Instead, she calculated the exact number of days (222) that Claimant worked during the 365 days preceding his injury, as reflected in the records of the Steamship Trade Association (EX 4, EX 13). Based on these records, Judge Chapman concluded that from April 6, 2000 to April 5, 2001, Claimant earned a total of $59,009.93. *Wozniak*, 2001-LHC-3365 at 16. She thus determined that Claimant's average weekly wage was $1,134.81. *Ibid*.[12]

Claimant now argues that these records are "obviously incorrect and in conflict with tax returns which should have been used" (Cl. Br. at 14). He also submitted into evidence statements of earnings for a portion of the applicable period in 2001 (CX 9).[13] However, I find that Judge Chapman's reliance on the records of the Steamship Trade Association was justified. First, those records reflect the actual number of hours worked and wages paid on the days relevant to this claim under Claimant's employee number (EX 4, EX 13). In contrast, Claimant's proposed alternative calculations continue to utilize an average weekly wage of $1,217.92 (computed by simply dividing Claimant's total income for tax year 2000, *see* Cl. Br. at 13-14) despite the fact that only the period April 5 through December 31, 2000 is relevant to Claimant's average weekly wage in this case. Employer argues, and I agree, that the process utilized by Judge Chapman here results in a more accurate calculation since the port at which Claimant worked could have been busier in the first three months of 2000, which period falls outside the one-year period applicable to this calculation (Emp. Letter of August 5, 2003). In fact, Judge Chapman's method appears particularly reliable, as it allowed her to consider actual income, excluding from the calculations the days when Claimant reported his hours under his son's

[12] Judge Chapman explained that use of Claimant's 2000 federal tax return in computing his average weekly wage was inappropriate for several reasons, including the fact that the return included income for only nine of the twelve months preceding Claimant's April 6, 2001 injury. *Wozniak*, 2001-LHC-3365 at 14, n.5.

[13] The records include earnings statements from Ceres Terminals, Inc., Tartan Terminals, Inc., P & O Ports, Inc., and Universal Maritime Service showing year-to-date earnings as of March 2001 (CX 9). They also include a supplemental schedule apparently attached to Claimant's 2000 tax return reflecting Longshore income totaling $63,319 for tax year 2000 which, when divided by 52 weeks, results in an average of $1,217.92 per week (Cl. Br. at 13).

number. *Wozniak*, 2001-LHC-3365 at 14, n.4. It further allowed her to take into account the fact that Claimant was able to obtain work only when it was available and thus could not have earned wages during all 52 weeks of the prior year. *Id*. at 16. I therefore find that Claimant has failed to show that Judge Chapman's determination with respect to the applicable average weekly wage was the result of a mistake of fact.

E. Interest.

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six percent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp*., 10 BRBS 724 (1978). The Benefits Review Board and the federal courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Santos v. General Dynamics Corp*., 22 BRBS 226 (1989); *Adams v. Newport News* Shipbuilding, 22 BRBS 78 (1989); *Smith v. Ingalls Shipbuilding*, 22 BRBS 26, 50 (1989); *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988); *Perry v. Carolina Shipping*, 20 BRBS 90 (1987); *Hoey v. General Dynamics Corp*., 17 BRBS 229 (1985); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board has stated that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimants whole, and held that "the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the district director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the district director.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Employer Universal Maritime Service shall pay Claimant temporary total disability compensation benefits and interest from April 16, 2002 to February 24, 2003 based on a wage earning capacity of $1,134.81 per week.

2. Employer Universal Maritime Service shall pay to Claimant all medical benefits to which he is entitled under the Longshore and Harbor Workers' Compensation Act.

3. Employer Universal Maritime Service shall pay to Claimant's attorney fees and costs to be established by supplemental order.

4. The district director shall perform all calculations necessary to effect this order.

5. The requests of Employer Universal Maritime Service and Claimant for modification of Judge Chapman's May 7, 2002 Decision and Order Granting Benefits is DENIED.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.